APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 51
HCA/2020/123/XC

Lord Justice General
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

APPEAL AGAINST CONVICTION

by

JOHN LEADBETTER

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg (sol adv); McCusker McElroy & Gallanach, Paisley
Respondent: Meechan QC AD; the Crown Agent

10 November 2020

Introduction

[1] This appeal raises four procedural and substantive issues. The first concerns the allowance of late objections to the admissibility of evidence; in particular the application of section 79A of the Criminal Procedure (Scotland) Act 1995. The second is about who is competent to give evidence about whether an indecent photograph depicts a child. The

third is whether a laptop and other items, which contained such, and other, indecent images, were properly identified as having been in the possession of the appellant. The fourth involves the application, in that regard, of section 68(3) of the 1995 Act.

Background

[2] On 5 February 2020, at the Sheriff Court in Hamilton, the appellant was found guilty of three charges as follows:

> "(1) between 23 August… and 10 September 2019… at… Street, Strathaven you… did have in your possession indecent photographs or pseudo-photographs of children; CONTRARY to the Civic Government (Scotland) Act 1982 Section 52A(1);
>
> (2) between 23 August… and 4 September 2019… at… Street, Strathaven you… did take or permit to be taken or make indecent photographs or pseudo-photographs of children; CONTRARY to the Civic Government (Scotland) Act 1982 Section 52 (1)(a)…; and
>
> (3) between 9 April… and 10 September 2019… at… Street, Strathaven you… did have in your possession extreme pornographic images depicting in an explicit and realistic way sexual intercourse between humans and animals; CONTRARY to the Civic Government (Scotland) Act 1982 Section 51A(1)."

[3] On 3 March 2020, the sheriff imposed an extended sentence of three years with concurrent custodial terms of 6 months on charges 1 and 2 and a consecutive term of 18 months (reduced from 20 months in respect of an earlier offer of a plea of guilty) on charge 3.

The Finding of the Images and the Objection

[4] On 10 September 2019, DCs Amanda Winning and Steven Halliday called unannounced at the appellant's home. Although this was presumably not before the jury, the appellant was subject to the notification requirements of the Sexual Offences Act 2003. The visit was a routine check upon his activities. The officers asked the appellant if he had

any devices with internet connectivity. He produced a non-internet mobile phone and a Lenovo laptop. DC Winning had noticed a Sky Q broadband hub and a rucksack, which had been hidden behind a chair. When he was asked what was in the rucksack, the appellant's demeanour changed. He became anxious and did not make eye contact. He handed the bag to DC Winning and said "There will be nudes on there". In the bag there was another, smaller laptop, a hard drive and USB discs. Where necessary, the appellant provided the passwords to allow the officers to access the items. The police found images on the smaller laptop which gave them cause for concern. The appellant was arrested.

[5] Neither police officer was asked to identify the items which had been found in the appellant's possession.

[6] DC James McGoldrick was aged 30 and had five years police experience. He was a computer forensic analyst in the Cybercrime Unit in Glasgow. His task was to examine devices seized by the police. He had been trained in this task. He had also had training with the Home Office "for categorisation of indecent images of children". DC McGoldrick described this as involving "a training course…which relates to the categorisation of images that are recovered from computer devices. …[T]hat is to allow us to categorise images which depict child sexual exploitation". In layman's terms this meant: "do the images that I'm looking at constitute child sexual exploitation and what is the level and nature of that child exploitation within pre-defined categories". DC McGoldrick had categorised well in excess of 150,000 images; not all of which would have been illegal. He had spent a lot of time looking at images and deciding whether they were indecent.

[7] DC McGoldrick explained that he had become involved in the appellant's case when other officers had told him about items which had been seized. From memory, these were two laptops, a mobile, a memory stick and a hard drive. They had been described by him in

a joint forensic report. When the procurator fiscal depute asked the witness to look at Production No 3, which was the report, the appellant's agent tendered an objection. This was that there had been no evidence that the witness was qualified to identify children. There required to be a doctor or other trained medical person to say whether a person was of a particular age. This stance was modified to an acceptance that it would have been sufficient if the witness had been trained in what to look for in a person's development to determine whether he or she was a child.

[8] The PFD took issue with the objection on the ground of lateness. An interim report, Production No 1, had been disclosed to the appellant in October 2019. This referred to the Nokia mobile which had been recovered from the appellant's address at 6.30pm on 10 September; the owner being named as the appellant and the Adobe and Google accounts related to an email address which included the name Leadbetter. The mobile contained a SanDisk Micro SD card. The password had been provided to the police. The SD card contained 38 category C images. One of these was described as showing a girl of between the ages of 12 and 14 with her breasts and genitals exposed. Attached to the report was a witness statement by DC McGoldrick which outlined his experience as a computer forensic analyst. The appellant had been provided with a full report (Production No 3, dated 28 October 2019) which had a statement annexed to it which also described the training and experience of DC McGoldrick.

[9] The sheriff repelled the objection. He noted that there had been no application to allow the objection to be raised on the basis that it could not reasonably have been raised in advance of trial. If there had been, it would have been refused; given that it could have been raised in advance of trial. Even if leave had been given to raise the objection late, it would have been refused on the basis that insufficient justification had been advanced for

excluding the evidence. A wide range of evidence types were available to demonstrate that a person was under the age of 16 (*sic*). Expert evidence was not required (*Griffiths* v *Hart* 2005 JC 313).

[10] In cross-examination, DC McGoldrick said that he did not have any "medical degrees" or "anthropological (*sic*) training". He was asked if he had had any paediatric training. He replied:

> "The training course that we undertake in relation to categorisation includes descriptions of the development of the human anatomy which would indicate age."

This area was not pursued further.

The Findings on the Recoveries

[11] DC McGoldrick identified ten items, which were referred to in joint reports (Productions 3 and 4), as having been those examined by him and a colleague. Only three of these were relevant. The first was item 2, the small Lenovo laptop (Label 1). This contained a driving licence application form in the name of appellant which was dated 2 September 2019. It also contained nine (five unique) easily accessible category C "child exploitation still images". One of these showed a 12 to 14 year old girl exposing her genitals. Twenty three still and three moving images of male and female bestiality were discovered. The second item (Label 2) was the Nokia mobile, which contained two contacts; one of which was the appellant, with his email address, and the other was "John Allan", whose address was that of the appellant. Twenty five indecent images of children (22 unique, but only one readily accessible) were discovered. One of these was of a naked girl aged between 12 and 14. Thirty three still and 86 images of bestiality were recovered; one of which involved a man and a pony and another a man and a calf. The third item (Label 3) was a Memory Box. This

contained a phone bill, dated March 2019, relating to the appellant. It contained two easily accessible category C images, including one of a naked girl aged between 10 and 12. Also discovered were 51 images of bestiality, including some involving a man and a rooster. In total, there were 36 images involving indecent images of children. These were primarily female, aged between 3 and 13. The images were created between 23 August and 4 September 2019.

[12] James McIntosh, another forensic computer analyst with the Cybercrime Unit with four years' experience, gave evidence. He had had training not only in the categorisation of indecent images but also in the grading of children's ages. The latter focused on the lack of body hair and underdevelopment. Recognising the features was a matter of experience. He had been involved in over 100 investigations. Mr McIntosh was, as the sheriff put it, laboriously taken through the various labels, the contents of the laptop, phone and Memory Box.

No Case to Answer Submission

[13] In due course the appellant submitted that there was no case to answer. He argued that there was no evidential link between what had been taken from the appellant's home and what had been examined later. He also maintained that the best evidence had been the images themselves, but these had not been shown to the jury. That had been essential, if the jury were to determine the content of the images. The sheriff repelled the submission. The examination of the items had uncovered material relating specifically to the appellant. The dates of recovery and examination and the content of the labels with what was said to have been recovered was sufficient proof, especially when combined with the appellant's demeanour when the recoveries had been made. The sheriff observed that the appellant had

had sufficient notice, by way of disclosure, of the contents of the images. Had he been concerned that the descriptions of the images by the witnesses did not conform to what they showed, the defence could have put the images, which had been lodged in DVD format, before the jury.

Submissions

Appellant

[14] The submissions made by the appellant essentially mirrored those which had been presented to the sheriff. First, DC McGoldrick was said not to be skilled in the identification of children. A doctor or other medically trained person had been required to prove that the images showed children. Although the appellant had received Productions 1 and 3 in advance of the trial, neither production had specified DC McGoldrick's skills or experience in categorisation or child development. There was no basis for objecting to DC McGoldrick's testimony until he provided information on his training and experience during the trial. In cross-examination, he had conceded that he had received no training in the developmental stages of children. The sheriff had erred in holding that the objection had not been timeous. If a witness was not an expert in the field, his testimony became inadmissible (*Hainey* v *HM Advocate* 2013 SCCR 309, approving Davidson: *Evidence* at para 11.13). In *Griffiths* v *Hart* (*supra*), the evidence of the police about age was used as corroboration and not the principal evidence (see also *Arnott* v *McFadyen* 2002 SCCR 96). It had been decided before *Gubinas* v *HM Advocate* 2018 JC 45 and *Shuttleton* v *Orr* 2019 SCCR 185, which had held that the fact finder could interpret the images without the aid of witnesses.

[15] Secondly, the Crown had failed to prove a link between the items recovered from the appellant's home and those subsequently examined. The police officers who had visited the appellant had not identified the productions. They did not speak to filling in the labels. They had not said what they had done with what they had seized. Before the Crown could found upon the contents of the items, in so far as pointing to the appellant, the provenance of the article had to be established. The real evidence could not establish its provenance. Section 68(3) did not excuse the Crown from not showing the items to the persons who had seized them (*Forrester* v *HM Advocate* 1952 JC 28).

[16] Once it had been established that the police did not have the necessary expertise to give evidence that the images showed children, their evidence that they did show children fell to be rejected.

[17] The Crown required to use the best evidence. That meant that they had to show the images to the jury and could not rely on the content of the reports. Items had to be lodged if their absence would be prejudicial to the accused (*Hughes* v *Skene* 1980 SLT (notes) 13; *Anderson* v *Laverock* 1976 JC 9). The images were real evidence which the jury could have assessed in determining whether to accept the testimony of the police.

Crown

[18] The advocate depute submitted that the sheriff had been correct to conclude that the objection could reasonably have been raised before the commencement of the trial. Having done so, he was bound to refuse leave for it to be considered (1995 Act, s 79A(4); *Bhowmick* v *HM Advocate* 2018 SCCR 35 at paras [26] to [28]). The appellant had been provided with DC McGoldrick's statement, which set out his experience and qualifications, in September 2019.

Production 3, which also listed his qualifications and experience, had been disclosed in November and December 2019.

[19] The productions had been lodged at the sheriff court in January 2020; more than 8 days before the trial diet. No notice had been given in terms of section 68(4) of the 1995 Act. It was therefore not necessary for the Crown to prove that the three items which had been examined were those which had been taken by the police from the appellant's home (*Carmichael* v *HM Advocate* [2020] HCJAC 4, at para [7]). In any event there was sufficient circumstantial evidence that the items were those found at his home from: (i) the testimony of the police officers who found the items; (ii) the appellant's reaction to that; (iii) the content of the labels attached to the items; and (iv) the finding of material specific to the appellant on the items.

[20] Proof that the subject of an indecent image was of a person under the age of 18 did not require an expert witness. A wide range of types of evidence might be available (*Griffiths* v *Hart* (supra) at paras [15] and [19]). It was necessary to demonstrate that a skilled witness did have relevant knowledge and experience to give evidence of fact, which was not based on personal observation, or of opinion. Where that was demonstrated, the witness could draw on the general body of knowledge and understanding (*Kennedy* v *Concordia Services* 2016 SC (UKSC) 6 at paras [42] and [50]).

[21] There was no requirement for the jury to assess the images themselves. The description of the images in the reports as spoken to by the police witnesses provided sufficient evidence of both the nature of the images and the age of the subjects. The defence had been given, and taken advantage of, an opportunity of having the images examined by an expert. A disc (label 5) containing the images had been lodged and the appellant could have shown them to the jury.

Decision

The Objection

[22] It is worth commenting *in limine* that it is surprising that it was thought either necessary or desirable to lead oral testimony to prove that the images contained in the items which were recovered were either indecent or that they depicted children. It was not part of the defence that they were not indecent nor was it contended that they were not images of children. Having regard to the duties upon the prosecution and the defence in section 257 of the Criminal Procedure (Scotland) Act 1995 to take all reasonable steps to reach an agreement upon matters which are not in dispute, these facts ought to have been agreed by joint minute. It that were not possible, the Crown ought to have used the provisions in section 258 in relation to uncontroversial evidence. The same might be said about the recovery of the items from the appellant's home. This too does not appear to have been in dispute.

[23] Section 79A(2) of the Criminal Procedure (Scotland) Act 1995 provides that, in the sheriff court, where a party raises an objection to the admissibility of any evidence after the first diet, the court shall not grant leave if written notice of an intention to do so has not been given. The court does have the power to dispense with this requirement. Section 79A(4) provides that the court shall not grant leave for an objection to be raised after the commencement of a trial unless it considers that "it could not reasonably have been raised before that time".

[24] Section 79A(2) was introduced as part of the recommendations for the reform of the High Court, some of which were extended to the sheriff court, in the Bonomy Report. One concern was the interruption of trial diets by objections to evidence which could have been

heard at a preliminary hearing or first diet. The importance of the resultant provision was recently emphasised in *Bhowmick* v *HM Advocate* 2018 SCCR 35, Lord Turnbull, delivering the opinion of the court, at para [25] *et seq* under reference to *Wade* v *HM Advocate* [2014] HCJAC 88. In the present case, if the appellant wished to object to the testimony of DC McGoldrick in relation to the ages of the children, there was ample opportunity to do so prior to trial. DC McGoldrick's expertise, or the lack of it, was disclosed in advance. The appellant were aware of the nature of his evidence. In these circumstances, the sheriff was entirely correct in his approach to the lateness of what was an entirely opportunistic objection to evidence about facts which were not even in dispute. In any event, there was no substance to the objection for two reasons. First, there is no need to have "expert" evidence, that is to say a skilled witness, to prove that a photograph depicts a child. There may be cases on the margins in which little weight may be put on a person's testimony that a person was a child rather than an adult; a child being a person under 18 in this context (Civic Government (Scotland) Act 1982 ss 52(2) and 52A(4)). In such cases, the evidence of a paediatrician may be advisable, if other sources, such as a birth certificate or the person's parents or other relatives, are not available. That is not to say that an adult witness, with a normal degree of experience of life, cannot express a view on whether a person, whether shown in a photograph or otherwise, is a child, especially if the person is naked. This is consistent with *Griffiths* v *Hart* 2005 SCCR 392, Lord Osborne, delivering the opinion of the court at para [15] citing *R* v *Land* [1999] QB 65, Judge LJ at 70-71. Once it is accepted, as it was in *Griffiths*, that the evidence of police officers was admissible to corroborate the evidence of a paediatric endocrinologist as to the age of girls shown in photographs, that evidence must be regarded as admissible as proof that the photographs depicted children.

[25] Whether a person appears to be a child is not a matter which requires technical or scientific evidence. Identifying a person as a child is part of everyday life. It is something within common knowledge and experience. A person is entitled to give evidence of his or her impression of whether someone is a child and, if so, within what age range. In light of all the evidence, the fact finder then has to decide whether "it appears from the evidence as a whole" that the person was under eighteen (1982 Act s 52(2)). This would, in any event, be something which a sheriff or a jury could do themselves by looking at the images, were that the evidential course taken. Given that the images referred to by DC McGoldrick were all of children under 14, and at least one was a child aged about 3, there ought to have been no difficulty in accepting the thrust of his testimony that the images were those of children.

[26] Secondly, DC McGoldrick did have special training in identifying whether someone was a child. Despite what was said in submissions both to the sheriff and to this court, he said both in chief and especially in cross that his Home Office training included being able to identify someone as a child.

Sufficiency

[27] It is assumed that the procurator fiscal depute simply forgot to put the labels to the officers who visited the appellant's home. It is a pity that, once she had discovered this error, she did not own up to it and ask for permission to recall the officers (Criminal Procedure (Scotland) Act 1995, s 263(5); see eg *Todd* v *McDonald* 1960 JC 93). Given that the point was a technical one and related to a matter which was not in dispute, it would have been somewhat harsh to refuse such a motion. It would presumably have saved what the sheriff described as the laborious process which followed.

[28] The laborious process did result in a sufficiency of evidence to link the items recovered to the appellant. In particular, the descriptions of the items recovered, which were given without objection, by the officers who visited the appellant coincided with the items spoken to by the officers who examined them not long thereafter. The appellant's statement was consistent with what was found on the items. Items relating specifically to the appellant, notably the driving licence application form, the contacts list and the phone bill, all pointed to the items which were examined being those which had been recovered from the appellant's home. There is simply no merit in this point.

[29] There is equally no merit in the submission that, because the jury were able to determine whether the photographs were images of children, there was requirement to show these images to the jury. There is something faintly disturbing in the idea that, in a matter which cannot have seriously have been disputed, the court should permit the unnecessary display of pornographic images involving children to members of the public who are serving on a jury.

[30] The PFD asked the police officers to describe the images which they had discovered. At that point, the defence could have objected to that question on the basis that the best evidence required that the images themselves be produced. In the absence of an objection, the officers were entitled to provide a description of the images. That testimony became evidence *in causa* and was available for the jury's consideration. It transpired to be unchallenged evidence. If a best evidence objection had been taken, that would not have required the images to be shown to the jury. It may have required the police officer to identify the images themselves, which were available on a DVD which had been lodged in court. But this was not necessary in the absence of an objection of the nature described. It would have been open to the defence to request that the images be put before the jury. The

sheriff may have had to rule on that. In this case, putting the images before the jury could have served no useful purpose in a situation where there was no dispute about what the images depicted.

[31] For these reasons the court is satisfied that there was a sufficiency of evidence to link the items recovered to the appellant. The court does not consider that the Crown's submission as to the effect of section 68(3)(b) of the Criminal Procedure (Scotland) Act 1995 was sound. That subsection provides that, where a witness has examined a production and the production has been duly lodged, it is not necessary to prove that the production which was examined was the one which was taken possession of by the procurator fiscal or the police. This provision was introduced, as an amendment to section 84 of the Criminal Procedure (Scotland) Act 1975, by section 23 of the Criminal Justice (Scotland) Act 1995. It would apply to the situation in which a witness, such as DC McGoldrick, speaks to having examined an item. It creates a presumption which obviates the need for a chain of evidence vouching transmission of the item from the police officer who takes possession of it at the scene of a crime to the witness who carries out the examination. The section does not impact upon the need for the recovering witness to identify the item which he took possession of in the first place.

[32] The appeal is refused.